No. 80-438

IN THE

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1980

GENEVIEVE GRAYDON,

Petitioner,

vs.

PASADENA REDEVELOPMENT AGENCY,

Respondent,

ERNEST W. HAHN, INC.

Real Party in Interest.

On Petition for Writ of Certiorari to
The Court of Appeal of the State of California
Second Appellate District.

BRIEF FOR RESPONDENT IN OPPOSITION.

EUGENE B. JACOBS,
of Eugene B. Jacobs,
a Professional Corporation
23223 Liahona Place,
Woodland Hills, Calif. 91367,
Attorney for Respondent Pasadena Redevelopment Agency.

Of Counsel

WEISER, KANE, BALLMER & BERKMAN,
HERBERT M. WEISER,
T. BRENT HAWKINS,
727 West Seventh St., Suite 500,
Los Angeles, Calif. 90017,

and

HAHN & HAHN,
DAVID K. ROBINSON,
301 East Colorado Boulevard,
Post Office Bin "B"
Pasadena, Calif. 91109.

STEARNS, KIM & WILLENS,
a Professional Corporation,
WILLIAM N. WILLENS,
1155 Union Bank Tower,
Torrance, Calif. 90503,
Attorneys for Real Party in Interest Ernest W. Hahn, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Questions Presented.

1. Has Petitioner seasonably raised any questions of federal law so as to confer upon this Court jurisdiction under 28 U.S.C. §1257 (3)?
2. Was Petitioner's Petition for Writ of Certiorari timely filed with this Court?
3. Has Petitioner complied with the rules of this Court pertaining to the content and filing of petitions for Writ of Certiorari?

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Opinion Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District, is reported as *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal. App. 3d 631, 164 Cal. Rptr. 56. Petitioner's petition for a hearing before the California Supreme Court was denied by order dated June 14, 1980. A copy of the aforementioned opinion and a typewritten facsimile of the notice of the aforementioned order are printed as appendices to Petitioner's Petition for Writ of Certiorari.

Jurisdiction.

There is a defect of jurisdiction over the subject matter of the questions sought to be raised by Petitioner. Petitioner has failed to state the grounds on which the jurisdiction of this Court is invoked. However, the provisions of 28 U.S.C. §1257 (3) govern jurisdictional questions on petition for Writ of Certiorari. Petitioner apparently claims that the Statute of Limitations contained in California Code of Civil Procedure Section 860 et seq. is unconstitutional in that it violates "a citizen's right to petition under the First Amendment and the rights to due process and equal protection under the Fifth and Fourteenth Amendments . . . " Petitioner has failed to show, however, that this question or any other federal question was raised before the courts of the State of California. The question of the repugnancy of California Code of Civil Procedure Section 860 et seq. to the federal Constitution or any other provision of federal law was never raised by Petitioner at any stage of the proceedings before the California courts. Consequently, no California court has adjudicated the Constitutional questions which are raised in this Court for the first time. It is therefore submitted that jurisdiction is lacking. Secondly, the California court's decision rests entirely on state law grounds.

On each of these two grounds it is submitted that jurisdiction is lacking *(Chicago I. & L.R. Railway Co. v. McGuire* (1905) 196 US 128, 130-133, 49 L. Ed. 413, 25 S. Ct. 200; *Godchaux Co. v. Estopinal* (1919) 251 US 179, 180-181, 64 L. Ed. 213, 40 S. Ct. 116; *Wall v. Chesapeake & Ohio Railway Company* (1921) 256 US 125, 126, 65 L. Ed. 856, 41 S. Ct. 402; *Rooker v. Fidelity Trust Co.* (1923) 261 US 114, 116-117, 67 L. Ed. 556, 43 S. Ct. 288; *Herndon v. Georgia* (1935) 295 US 441, 443, 79 L. Ed. 1530, 55 S. Ct. 794; *Herb v. Pitcairn* (1945) 324 US 117, 125, 89 L. Ed. 789, 65 S. Ct. 459; *Ellis v. Dixon* (1955) 349 US 458, 460, 99 L. Ed. 1231, 75 S. Ct. 850; *Cardinale v. Louisiana* (1969) 394 US 437, 438-9, 22 L. Ed. 2d 398, 89 S. Ct. 1162; *Tacon v. Arizona* (1973) 410 US 351, 352, 35 L. Ed. 2d 346, 93 S. Ct. 998; Moore, *Federal Practice* (2d.ed.), vol. 12, §§510.01, 511.01, 512.01.)

As stated in *Chicago I. and L.R. Railway Co. v. McGuire* (1905) 196 US 128, 133, 49 L. Ed. 413, 417, 25 S. Ct. 200:

> "This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all resources of litigation have been exhausted."

Petitioner's case is a classic example of the above quotation.

Other questions raised by Petitioner essentially re-state and re-argue issues of state law decided by the Courts below solely on the basis of the interpretation of California law. Such questions fail to confer jurisdiction on this Court inasmuch as they contain no questions of federal law.

Statement of the Case.

In February, 1975, Respondent and H-CHH Associates ("Developer"), a limited partnership, composed of Real Party in Interest and Carter Hawley Hale Stores, Inc., approved and executed a Disposition and Development Agreement ("DDA") for the construction in the Pasadena Down-

town Redevelopment Project of an enclosed retail shopping mall and appurtenant public parking facilities (Clerks Transcript, "C.T.", p. 726). Under the DDA, Respondent acquired the designated site, relocated the occupants, performed demolition and clearance and then conveyed a portion of the site consisting of an air rights parcel, to Developer for construction of the shopping mall. On the portion of the site retained by Respondent, Respondent has constructed three public parking garages. Two of these structures are located adjacent to the mall, across the public right-of-way and are connected to the mall by pedestrian bridges. Contracts for construction of these two structures were competitively bid. The third structure is a subterranean garage located directly beneath the shopping mall (C.T. pp. 726-727). The publicly owned subterranean garage and the privately owned shopping mall are a single structure, with completely integrated footings, foundations and support, interconnecting stairways, escalators and elevators, etc. (C.T. pp. 28-31, 32-4 and 41-43).

Recognizing the integrated nature of the shopping mall and the subterranean garage and the time delays and increased costs which would accrue if the two were constructed simultaneously by two different contractors, the DDA stated that it was the desire of Respondent, subject to legal requirements, to negotiate with Developer's general contractor, Ernest W. Hahn, Inc. (Real Party in Interest) for the construction of the subterranean garage, based on a stated guaranteed maximum price (C.T. p. 729). On November 2, 1977, at a meeting at which Petitioner was present, Respondent awarded the contract for construction of the subterranean garage to Real Party in Interest without having competitively bid the contract. This act was taken in reliance upon a full written legal opinion of Respondent's general counsel that the contract for construction of the

subterranean garage was not subject to the competitive bidding requirements of California Health & Safety Code Section 33422, since California law clearly establishes that notwithstanding statutory provisions to the contrary, competitive bidding is not required where competitive proposals would be unavailing, not produce an advantage, and would be undesirable, impractical or impossible (C.T. pp. 730-731).

This action was brought on January 26, 1978, by the filing of a Petition for Writ of Mandamus in Superior Court of Los Angeles County (C.T. p. 1). The allegations of that petition are set forth in Petitioner's Petition for Writ of Certiorari, at pages two through six. The Petition for Writ of Mandamus essentially states that Petitioner is a resident and taxpayer of the City of Pasadena, California, sets forth the fact of the award of the contract for construction of the subterranean garage without competitive bidding, cites the provisions of Health & Safety Code Section 33422 and alleges: (1) that award of the Parking Garage Contract to Hahn without competitive bidding is illegal, (2) that such contract is "null and void", and (3) that payment from Respondent to Real Party in Interest of public funds pursuant to the provisions of such contract is unauthorized and a misuse of public funds. Petitioner then prays for relief (1) directing Respondent to advertise for competitive bids, (2) declaring the subject contract illegal, and (3) prohibiting Respondent from disbursing any funds under such contract. Petitioner nowhere alleged violation of any federal constitutional or statutory rights. The Petition for Writ of Mandamus is founded entirely upon California law.

In answer to the Petition for Writ of Mandamus, Respondent set up the bar of the Statute of Limitations contained in California Code of Civil Procedure Sections 860-870, made applicable by the provisions of California Government

Code Section 53511 (C.T. p. 82). These sections establish a procedure for validating contracts and other actions of public agencies and contain a 60 day Statute of Limitations, running from the date of authorization of the contract, for actions brought contesting the validity of bonds, warrants, contracts, obligations or evidences of indebtedness to which such statutory provisions are applicable.

The Superior Court of Los Angeles County held the action barred by the Statute of Limitations contained in California Code of Civil Procedure Sections 860-870 (C.T. p. 737). No federal questions were raised or adjudicated in Superior Court.

The judgment of the Superior Court was sustained by the Court of Appeal of the State of California, Second Appellate District in *Graydon v. Pasadena Redevelopment Agency* 104 Cal. App. 3d 631, 164 Cal. Rptr. 56, wherein the Court of Appeal expressly recognized that in addition to Petitioner's action being barred by the State of Limitations, this was a case in which competitive bidding was not required. No federal questions were raised or adjudicated before the Court of Appeal. The decision of that court rested solely on state law.

Petitioner's Petition for a hearing before the California Supreme Court, which again was based solely on matters of California law and presented no federal questions whatever, was denied by order dated June 4, 1980. A typewritten facsimile of the notice of that order is included in the appendix to the Petition for Writ of Certiorari.

On or about August 18, 1980, Petitioner submitted to this Court a Petition for Writ of Certiorari which was returned to Petitioner by this Court shortly thereafter for failure to comply with the rules governing submission of such petitions. Thereafter, on September 19, 1980, Petitioner sub-

mitted to this Court a second, virtually identical Petition for Writ of Certiorari, again dated August 18, 1980, but containing certain additional appendices. This second petition was served on Respondents September 18, 1980. The notice of the date of filing and docket number required by Rule 19.3 of the rules of this Court was not received by Respondent until October 2, 1980.

The subterranean garage, the two adjacent garages and the retail shopping center are now constructed, fully operational and have been in use since August, 1980. This entire matter is therefore moot.

ARGUMENT.

A. This Court Lacks Jurisdiction of the Subject Matter of the Questions Sought to Be Presented by Petitioner.

Petitioner has attempted in her Petition for Writ of Certiorari before this Court to raise for the first time questions of federal law. An examination of Petitioner's Petition for Writ of Mandamus, the Findings of Fact and Conclusions of Law of the Superior Court of Los Angeles County and the opinion of the California Court of Appeal (all of which are reproduced in the Petition for Writ of Certiorari) and the entire record in this case disclose no previous mention whatever of any federal statutory or constitutional questions. In her Petition for Hearing before the California Supreme Court, again, no questions of federal law were raised.

The decisions of the courts below are based exclusively on matters of California law. This case was decided, both in Superior Court and the Court of Appeal, on questions relating to the applicability and operation of the Statute of Limitations contained in California Code of Civil Procedure Section 863. By denying Petitioner's Petition for Hearing, the California Supreme Court confirmed that the principles on which this case was decided below are well-settled in California law. No California court has ruled on the alleged federal constitutional questions presented in Petitioner's Petition for Writ of Certiorari.

Few principles are more firmly established than that the United States Supreme Court will not pass on a constitutional question presented to it on appeal from a state court judgment where the state court has not had an opportunity to rule on the question (*Cardinale v. Louisiana* (1969) 394 US 437, 438-9, 22 L. Ed. 2d 398, 89 S. Ct. 1162). A litigant must both raise the constitutional question in the

trial court and preserve the question on appeal through the state courts (*Bailey v. Anderson* (1945) 326 US 203, 90 L. Ed. 3, 66 S. Ct. 66). Where the federal question is not raised below, or called to the attention of, or decided by the state court, the United States Supreme Court is without jurisdiction to review the judgment (*New York ex rel. Rosevale Realty Co. v. Kleinert* (1925) 268 US 646, 69 L. Ed. 1135, 45 S. Ct. 618; *Missouri P.R. Co. v. Hanna* (1924) 266 US 184, 69 L. Ed. 235, 45 S. Ct. 36; *Cardinale v. Louisiana* (1969) 394 US 437, 438-9, 22 L. Ed. 2d 398, 89 S. Ct. 1162; *Tacon v. Arizona* (1973) 410 US 351, 352, 35 L. Ed. 2d 346, 93 S. Ct. 998; Moore, *Federal Practice*, (2d ed.), vol. 12 §510.01). This rule has been held to preclude the exercise of jurisdiction by this Court even where the federal question was raised before the state court of highest jurisdiction on a petition for re-hearing before such court (*Rooker v. Fidelity Trust Co.* (1923) 261 US 114, 116-117, 67 L.Ed. 556, 43 S. Ct. 288).

In *Cardinale v. Louisiana* (1969) 394 US 437, 438, 22 L. Ed. 2d 398, 400, 89 S. Ct. 1162, this Court stated:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20 §25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet 368, 391, 9 L Ed 458, 467.

The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1289, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobiles Ins. Co. v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 6670-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875).

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds. O'Connor v. Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them."

Furthermore, even if a federal question had been raised in a state court, if the state court decision rests on adequate state grounds, the Supreme Court has no jurisdiction

(Moore, *Federal Practice* (2d ed.), vol. 12, §511.01; *Ellis v. Dixon* (1955) 349 US 458, 460, 99 L. Ed. 1231, 75 S. Ct. 850). Justice Jackson, in *Herb v. Pitcairn* (1945) 324 US 117, 125, 89 L. Ed. 789, 65 S. Ct. 459, stated:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted.] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction."

A review of the opinion of the District Court Appeal shows it rests entirely on adequate and independent state grounds.

Even if Petitioner had raised a federal question in the state courts, which she did not, and even if the state court had ruled on such question and based its ruling on it and not on independent state grounds, which it did not, the Supreme Court does not have jurisdiction if the federal question is not substantial (*Zucht v. King* (1922) 260 US 174, 67 L. Ed. 194, 43 S. Ct. 24; Moore, *Federal Practice* (2d ed.), vol. 12, §512.01). It is submitted that the federal question raised by Petitioner for the first time in this Court is not substantial.

Petitioner having failed to raise and preserve any federal question and the state court decision resting on adequate and independent state grounds, this Court lacks jurisdiction over the subject matter of the federal constitutional questions now sought to be raised. Other contentions presented by Petitioner as a "LIST OF CORRECTIONS IN SUPPORT OF PETITIONER", do not even purport to contain questions of federal law. Such contentions relate primarily to Petitioner's allegations in her Petition for Writ of Mandamus that the award of the contract for construction of the sub-

terranean garage contravenes state competitive bidding requirements. These issues were not adjudicated in the California courts, as they were held barred by the operation of the Statute of Limitations. Even if such questions had been adjudicated, jurisdiction would not thereby be conferred on this Court, since such questions relate solely to matters of state law and contain no federal questions.

Respondent therefore submits that this Court should deny Petitioner's Petition for Writ of Certiorari for lack of jurisdiction over the subject matter.

B. Petitioner's Petition for Writ of Certiorari Was Not Timely Filed Before This Court.

The Rules of the Supreme Court of the United States ("Rules"), Rule 20.2, require that a petition for Writ of Certiorari be filed within 90 days after entry of judgment. The time for filing a petition for Writ of Certiorari runs from the date the judgment or decree sought to be reviewed is rendered (Rule 20.4). The California Supreme Court denied Petitioner's Petition for Hearing on June 4, 1980, rendering final the judgment of the Court of Appeal (California Rules of Court, Rule 24(a)). On or about August 25, 1980, Petitioner filed with this Court a petition for Writ Certiorari, dated August 18, 1980. On or about August 18, 1980, Respondent received in the mail three copies of such petition. Shortly thereafter attorneys for Respondent learned by telephone conversation with the Clerk of this Court, that Petitioner's Petition had been returned to her for failure to comply with the Rules. This was accomplished by letter dated August 27, 1980. On September 18, 1980, attorneys for Respondent again received in the mail three copies of a second Petition for Writ of Certiorari. This petition contained the earlier petition, dated August 18, 1980 and in addition, a list of "Questions Presented" and certain orders and opinions of the California Courts attached as an appendix. This second Petition for Writ of Certiorari was filed with this Court on September 19, 1980. Not until October

2, 1980, did attorneys for Respondent received the notice of filing and docket number required by Rule 19.3. That notice listed the date of filing of the Petition for Writ of Certiorari as August 25, 1980. It is apparent that August 25, 1980 could not be the date of filing of the second petition, since the first petition was not returned to Petitioner until August 27, 1980.

Respondent's second Petition for Writ of Certiorari having been filed on September 19, 1980, and therefore more than 90 days from the date of judgment, Respondent submits that this Court should deny Petitioner's Petition for Writ of Certiorari as not having been timely filed.

C. Petitioner's Petition for Writ of Certiorari Is Defective Under the Rules.

This Court should deny Petitioner's Petition for Writ of Certiorari for failure to comply with Rule 21. The following is a listing of the defects of said petition:

1. The petition lacks a reference to the official report of the opinion of the California Court of Appeal, Second District, as required by Rule 21.1(d).
2. The petition lacks a concise statement of the grounds on which the jurisdiction of this Court is invoked (Rule 21.1(e)), inasmuch as Petitioner fails to cite the statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari (Rule 21.1(e)(iv)).
3. The petition fails to comply with the provisions of Rule 21.1(f) requiring the setting out verbatim of the constitutional provisions, etc., which the case involves.
4. The petition lacks a concise statement of facts (Rule 21.1(g)).

5. The petition fails to specify the stage in the proceedings at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way they were passed upon by the Court, with appropriate citations to the record, so as to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari (Rule 21.1(h)). The petition cannot be amended to comply with this rule, since, as set forth above, no federal questions were raised before the California courts.
6. The petition lacks the statement amplifying the reasons relied on for allowance of the writ required by Rule 21.1(j).
7. The petition fails to present with accuracy, brevity, and clearness the matters essential to a ready and adequate understanding of the points requiring consideration (Rule 21.5).

Conclusion.

Petitioner failed to properly raise and preserve in the California courts the federal constitutional questions which are advanced in the petition, creating a fatal jurisdictional defect. The opinion of the California Court of Appeal rests entirely on adequate and independent state grounds, likewise creating a fatal jurisdictional flaw. Other matters advanced by Petitioner contain no federal questions. This Court therefore lacks jurisdiction over the subject matter of this case.

Additionally, the Petition for Writ of Certiorari was not timely filed and contains numerous serious defects of both form and substance.

Finally, Petitioner has included in her Petition for Writ of Certiorari many comments and contentions which are

both self-serving and outside the record. Because of the jurisdictional defects in the petition, Respondent has chosen not to respond to each of such comments and contentions. By so doing, Respondent does not agree with or acquiesce in any of Petitioners contentions. Respondent beleives that a full and fair account of this case is contained in the opinion of the California Court of Appeal.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EUGENE B. JACOBS
of Eugene B. Jacobs,
a Professional Corporation
Attorney for Respondent Pasadena Redevelopment Agency.

Of Counsel
WEISER, KANE, BALLMER & BERKMAN,
HAHN & HAHN.
STEARNS, KIM & WILLENS